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SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

SOUTHERN UTAH WILDERNESS ALLIANCE, et at, Petitioners, v. **DIVISION OF OIL, GAS, & MINING DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH,** Respondent.	**INTERVENOR'S RESPONSE TO PETITIONERS' REQUEST FOR AGENCY ACTION AND REQUEST FOR A HEARING** Docket No. 2009-019 Cause No. C/025/0005

COMES NOW, Intervenor Kane County, by and through its counsel, William L. Bernard, Deputy Kane County Attorney, and hereby responds in opposition to the *Petitioners' Request for Agency Action and Request for a Hearing*, filed on or about

November 18, 2009 (hereinafter the "**Request**") in the above-captioned matter. This response is based upon the following memorandum of points and authorities.

PROCEDURAL HISTORY/STATEMENT OF FACTS

1. On June 27, 2006, Talon Resources, Inc., submitted a permit application for the Coal Hollow Mine (the "**Mine**")—a proposed surface coal mine located approximately three (3) miles south of the Town of Alton in Kane County, Utah, and alleged to be approximately ten (10) miles from the extreme southwest corner of Bryce Canyon National Park in Upper Sink Valley.
2. On August 28. 2006, the Board of the Division of Oil, Gas, and Mining (the "**Board**") determined that the application was incomplete and returned it.
3. On June 14, 2007, Alton Coal Development, LLC ("**ACD**") submitted a revised application (the "**Application**") for the Mine.
4. On March 14, 2008, the Board deemed ACD's application administratively complete and a technical review and public commenting period followed.
5. On May 22, 2008, the Utah Chapter of the Sierra Club ("**Sierra Club**"), the Southern Utah Wilderness Alliance ("**SUWA**"), the Natural Resources Defense Council ("**NRDC**"), and the National Park Conservation

Association ("**NPCA**")(collectively, the "**Petitioners**"), filed comments on the permit.

6. On June 16, 2008, the Division convened an informal conference in Alton, Utah, to receive additional written and oral comments on the mine and the proposed relocation of County Road 136, and the informal conference written comment period was extended to June 20, 2008. A total of twelve (12) written comments were received, which included a petition requesting further studies of natural and cultural resources in the adjacent area.
7. On December 22, 2008, ACD provided a subsequent update to the Application.
8. On August 19, 2009, ACD provided a second subsequent update to the Application.
9. On October 8, 2009, ACD provided a third subsequent update to the Application.
10. On October 19, 2009, the Division issued a decision document approving ACD's permit application. Utah Division of Oil Gas and Mining, *Decision Document and Application Approval* (October 19, 2009)(the "**Decision Document**").
11. The Decision Document authorizes surface mining on 635.64 acres in

sections 19, 20, 29, and 30, T39S, R5W, SLM, and provides for the mining of 2,000,000 tons of *private* coal per year for approximately three (3) years on privately-owned land, operating twenty-four (24) hours per day, six (6) days per week, with all of the minerals leased by ACD from private owners.

12. ACD also has applied to the Bureau of Land Management ("**BLM**") to lease federal coal on 3,600 acres of adjacent public land and has an interest in such federal property subject to the Lease by Application Process.

13. The Decision Document necessarily has a substantial impact on Kane County, including but not limited to the rights of Kane County citizens to travel on State highways for business purposes, Kane County's tax base and assessments, its demographics, wage scale and employment opportunities.

14. The Mine will create jobs for approximately 100 full-time employees, 50 full-time truck drivers, and 10 full time transportation support employees, most of who will reside in Kane County.

15. On November 18, 2009, Petitioners filed their Request in this matter pursuant to UTAH ADMIN CODE R641.104.122 and R641.104.133, as an appeal of the Decision Document entered by the Division, arguing

specifically that **(1)** they maintain legal authority, jurisdiction and standing to file the Request; **(2)** the Division acted arbitrarily, capriciously, and contrary to law in failing to withhold approval of ACD's Application and in allegedly failing to conduct a cumulative hydrologic impact assessment ("**CHIA**"); and **(3)** ACD's Application is allegedly inaccurate and incomplete in thirty-two (32) different areas.

16. On December 8, 2009, ACD filed its *Respondent/Permittee's Response to Request for Hearing*, opposing each of the areas raised by Petitioner's in the Request.

17. On December 9, 2009, the matter came for a meeting before the Board, at which the parties stipulated to Kane County's intervention in these matters.

18. At that meeting, the Petitioners in this matter made it clear that they had filed unsupported allegations in an effort to obtain revocation of ACD's mining permits; for example, counsel for Sierra Club stated on the record that he did not have any of the data to support the allegations made in the Request.

I. THE MATTER SHOULD BE REVIEWED UNDER APPELLATE STANDARDS RATHER THAN REHEARING STANDARDS

UTAH ADMIN. CODE R641-110-100 governs the time for filing any petition for rehearing on a decision made by this Board, indicating that such petition ". . .must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought." *Ibid.* UTAH ADMIN. CODE R641-110-500 provides that "[a] request for modification or amendment of an existing order of the Board will be treated as a new petition for purposes of these rules." The Request in the instant matter was not filed pursuant to UTAH ADMIN. CODE R641-110-100, but was taken rather as an appeal to this Board from the Decision Document.

Conversely, when an appeal is taken from a decision of this Board and because this Board may reference the code of Federal Regulations, the time frame for filing is thirty (30) days from the entry of a decision from this Board. *See,* 30 C.F.R. §775.11(a)("Within 30 days after an applicant or permittee is notified of the decision of the regulatory authority concerning an application for approval of exploration required under part 772 of this chapter, . . .the applicant, permittee, or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the decision, in accordance with this section.") Under 30 C.F.R. §775.11(b)(3) it indicates that "the hearing authority may administer oaths and affirmations, subpoena

witnesses and written or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations." *Ibid.*

Although the hearing authority maintains discretionary authority to take evidence at a hearing held on a petition filed under 30 C.F.R. §775.11(a), the evidence allowable pertains to items such as site inspections and other mining operations carried on by the applicant. It is not treated as a new petition as under the requests for modifications or amendments. The process through which an application is obtained through this Division allows for input from the community and others affected by the proposed permit during that time. *See,* UTAH ADMIN. CODE R645-300-123, *et. seq.* ("Any person having an interest which is or may be adversely affected the decision on the application. . .may request in writing that the Division hold an informal conference on the application for a permit. . ." If a permit is granted after all information is received and processed by this Division, an appeal can then be taken if an interested party chooses to do so. *See,* 30 C.F.R. §775.11(a).

On June 16, 2008, the Division convened an informal conference in Alton, Utah, to receive additional written and oral comments on the mine, and the informal

conference written comment period was extended to June 20, 2008. A total of twelve (12) written comments were received, which included a petition requesting further studies of natural and cultural resources in the adjacent area. This Division took all additional information received during this informal conference stage when entering the Decision Document.

The standard of review to thus be applied at this stage would be one of appellate review rather than rehearing. Although the reviewing authority has discretion to conduct discovery and a hearing with witnesses called, any information derived during this time should be limited to the four corners of the permitting process. Other interested parties, such as Petitioners in this matter, had the opportunity to present evidence to the Division during the informal conference procedures dictated under UTAH ADMIN. CODE R645-300-123, *et. seq.*, and have opted to file an appeal under 30 C.F.R. §775.11(a) from the Decision Document rather than for rehearing under UTAH ADMIN. CODE R641-110-100, and are thus limited to the four corners of the permitting process in their submissions to this Division rather than their Request being treated as a new petition for purposes of the rule under UTAH ADMIN. CODE R641-110-500.

II. ALL UNSUPPORTED ALLEGATIONS SHOULD BE STRICKEN.

Under UTAH CODE ANN. §40-8-2, it states as follows:

The Utah Legislature finds that:

(1) A mining industry is essential to the economic and physical well-being of the state of Utah and the nation.
(2) It is necessary to alter the surface of the earth to extract minerals required by our society, but this should be done in such a way as to minimize undesirable effects on the surroundings.
(3) Mined land should be reclaimed so as to prevent conditions detrimental to the general safety and welfare of the citizens of the state and to provide for the subsequent use of the lands affected. . . At UTAH CODE ANN. §40-6-1, our Utah Legislature declared as follows:
It is declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners may be fully protected; to provide exclusive state authority over oil and gas exploration and development as regulated under the provisions of this chapter; to encourage, authorize, and provide for voluntary agreements for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these vital natural resources.

Similarly, our United States Legislature has found and declared as follows:

(a) Extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;
(b) Coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;
(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.
(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this chapter is an appropriate and necessary means to

minimize so far as practicable the adverse social, economic and environmental effects of such mining operations.

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States; . . .

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations. 30 U.S.C. §1201. In Utah, the Board of Oil, Gas and Mining was created to "... be the policy making body for the Division of Oil, Gas and Mining," with such Board consisting of two (2) knowledgeable members in mining matters, two (2) knowledgeable members in oil and gas matters, one (1) knowledgeable member in ecological and environmental matters, and one (1) private land owner who is knowledgeable about mineral or royalty interests. UTAH CODE ANN. §§40-6-4(1) and (2).

Under UTAH ADMIN. CODE R641-108-200 through -204, it states as follows:

200. The Board shall use as appropriate guides the Utah Rules of Evidence insofar as the same may be applicable and not inconsistent with these rules. Notwithstanding this, on its own motion or upon objections of the party, the Board:

201. May exclude evidence that is irrelevant, immaterial, or

unduly repetitious.

202. Shall exclude evidence privileged in the courts of Utah.

203. May receive documentary evidence in the form of a copy of excerpt if the copy or excerpt contains all pertinent portions of the original document.

204. May take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record or other proceedings before the Board, and of technical or scientific facts within the Board's specialized knowledge.

UTAH ADMIN. CODE R641-108-300 allows for "[t]estimony presented to the Board in a hearing [to be] sworn testimony under oath or affirmation." UTAH ADMIN. CODE R641-108-900 allows discovery against another party upon motion of a party and for good cause shown ". . .as prescribed by and in the manner provided by the Utah Rules of Civil Procedure."

In the instant matter, Petitioners conceded through counsel at the December 9, 2009, hearing that they lacked the requisite supportive data with respect to their claims contained in the Request, indicating that they filed the Request with such knowledge in hopes of persuading this Division to revoke the permit already granted by the Division to ACD. Not only does this support sanctions in this matter, but clearly supports a finding by this Board that the allegations of the Request lack the requisite support by the proponent's own concession.

Given the codification by both the State and Federal governmental entities in this matter of the anticipated impact mining has upon the environment and the various agencies having had input during the promulgation of such legislative declarations, it is presumed that the regularity of the proceedings held by the Division in these matters ensure the upholding of such provisions. UT. R. EVID. 301(a), which applies to these proceedings in accordance with UTAH ADMIN. CODE R641-108-200, *supra*, indicates a "presumption of law" imposed upon "the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Given the substantial requirements for the Application in this matter, and the discretion of the Division in determining the granting of permits for the purpose of coal mining, it is clear why the burden of proof at administrative hearings is "...on the party seeking to reverse the decision of the regulatory authority." 30 C.F.R. §775.11(b)(5). "If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy." UT. R. EVID. 301(b). "If evidence to rebut a presumption has not been admitted, the presumption will determine outcome on the issue. . ." *Id.*, Advisory Committee Note.

In essence, ACD undertook the extensive process of application through this Division as outlined by the UTAH ADMIN. CODE R645-300-100 through -223 and R 645-301-100 through -800 and was granted through the Decision Document the right

to coal extraction in the Mine. Petitioners did not bring any actual tangible evidence that would otherwise be admissible under the applicable Utah Rules of Evidence before this Board, but simply speculated, conjectured and outright admitted at the December 9, 209, hearing, their lack of such evidence to support the allegations made in the Request. Absent tangible admissible evidence refuting this Division's Decision Document, the regularity of such determination should be presumed and control, resulting in dismissal of the Request in this matter.

Further, there was not a scintilla of evidence presented at the hearing to support Petitioner's Request. As a result all such allegations of Petitioners' should be stricken.

III. MOTION FOR SUMMARY JUDGMENT IS APPROPRIATE.

Summary judgment is proper " '... if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *McLarney v. Board of County Road Com'rs For County of Macomb*, 2005 WL 3008591, 4 (E.D.Mich.)(E.D.Mich.,2005). A fact is 'material' if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Wright ex. rel. Trust Co. v. Abbott Labs, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001)(*citing Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664,

670 (10th Cir 1998)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler, supra, at 670, citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. Am. Guar. & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000). The burden then shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial, and the party may not simply rest upon its pleadings to satisfy its burden. *Anderson, supra*, 477 U.S. at 256; *Eck v. Parke, Davis & C.*, 256 F.3d 1013, 1017 (10th Cir. 2001).

UTAH ADMIN. CODE R641-110-400 allows the Board to summarily deny a petition or the Request herein when modification or amendment is sought. ACD sets forth specific and precise arguments in their *Respondent/Permittee's Response to Request for Hearing* that entitle ACD to judgment as a matter of law and there are no additional substantial questions of facts. ACD has shown that they submitted sufficient hydrologic monitoring data, that an alluvial valley floor does not exist with the permit area, ACD statement of probable hydrologic consequences is acceptable,

the hydrologic monitoring plan is adequately described in the mining and reclamation plan, ACD provided all information necessary at this stage regarding replacement water sources, the Board properly found that ACD air pollution control plan is adequate, the Board's C.H.I.A. properly delineates the impact area for ground water resources, the Board properly identified material damage criteria in light of conditions prevailing at the site, the mine is properly designed, the Board properly found that conditions in lower Robinson Creek supported waiver of the stream buffer zone, the approved permit provides all of the protection for sage grouse and other wildlife.

ACD has met each of the criteria of the application process for the permit under UTAH ADMIN. CODE R645-300-100 through -223 and R 645-301-100 through -800. There has been no tangible or substantive evidence presented at all by the Petitioners as to any arbitrary or capricious actions by this Board in granting such permit. The Petitioners have failed to raise any issue of genuine material fact in their Request, and they have failed to present evidence to support their claims. *Wright, Adler*, and *Adams*, *supra*. They cannot rely on the Request alone. *Anderson*, *supra*. Therefore the Board should grant a motion for summary judgment on each of the points presented by ACD.

IV. FIFTH AMENDMENT TAKINGS LAW WOULD REQUIRE COMPENSATION IN THE EVENT THE PERMIT WAS DENIED.

The Takings Clause states, "private property [shall not] be taken for public use, without just compensation." U.S. CONST. AMEND. V. Our Utah Constitution provides similarly that, "[p]rivate property shall not be taken or damaged for public use without just compensation." UTAH CONST. ART. I § 22.

In *State ex rel. State Road Commission v. District Court*, the Court stated that "taking" is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." *Ibid.*, 94 Utah 384, 78 P.2d 502, 506 (1937) (*quoting* Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 211, 77 P. 849, 852 (1904); *see* Hampton v. State Road Comm'n, 21 Utah 2d 342, 347, 445 P.2d 708, 711-12 (1968).)

If the permit is denied, a "taking" under the Fifth Amendment is implicated. Such would substantially affect the private property rights requiring just compensation.

"In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' *Lingle, Governor of Hawaii, Et Al., v. Chevron U.S.A. Inc.*, 544 U.S. 528

(265) (2005) at 430 citing *Pennsylvania Coal Co v. Mahon*, 393 at 415 (1922).

V. A 1983 INVERSE CONDEMNATION WILL HAVE OCCURRED IF THE PERMIT IS DENIED.

"If private property is taken or damaged for public use absent formal use of Utah's eminent domain power, a property owner may bring an inverse condemnation action under the state constitution to recover the value of the property." *Gardner v. Board of County Com'rs of Wasatch County, 2008 UT 6, ¶28, 178 P.3d 893, citing Farmers New World Life Ins. Co. v. Bountiful City, 803 P.3d 1241, 1243 (Utah 1990); UTAH CONST. ART. I § 22.* As a result, and to avoid an unconstitutional taking, the Board should uphold its prior ruling.

VI. THE ALTON COAL DEVELOPMENT LEASEHOLD CONTRACTS ARE CONSTITUTIONALLY PROTECTED.

People have the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a personal right. *Lynch v. Household Finance Corp.*, 405 U.S. 538,552 (1972)."

Even if this were properly viewed as an exercise within the State's police power, denial of the permit is not a proper exercise of that power. This is true because ACD seeks lawful utilization of its property. Contract rights at issue have also become independent property rights having additional protections. The Coal leaseholds are not just a contract. There are also evidence of accrued rights to action

enjoying y their own Constitutional protections and not subject to any acknowledged "police power" exception.

Echoing the point made in the *Pacific Mail Steamship* case, the Supreme Court elaborated in *Coombes v. Getz*, 285 U.S. 434,441-442 (1932) that "neither vested property rights nor the obligations of contracts of third persons may be destroyed or impaired. (Cites omitted.) It did not arise upon the Constitutional rule of law but upon the contractual liability created in pursuance of the contract. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth.

In more or less recent cases, the Supreme Court has expanded protected property rights to include even claims or entitlements. (See Goldberg; v. Kellv, 397 U.S. 254 (1970); Bd. Of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) and American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).)

VII. DENYING ALTON COAL DEVELOPMENT THE PERMIT WOULD IMPAIR CONSTITUTIONALLY PROTECTED LEASEHOLD CONTRACTS

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. . ." (Fletcher v. Peck, 6 Cranch 162 (1810).) Chief

Justice Marshall elaborated some nine years later. "What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." (Sturges v. Crowninshield, 4 Wheat. 122 (1819).)

"The obligation of a contract consists in its binding force on the party who makes it. . . . There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce performance by the remedies then in force." (McCracken v. Hayward, 2 Howard 397,399 (1844).)

In the case at bar, we have documentary evidence of a valid lease, the **ACD** lease. The lease describes the obligation of the parties and the consideration involved with great specificity.

Because all the elements of contract are present in the coal lease, it must be concluded that it is a contract. This contract cannot be impaired without abridging the constitution. *Getz, supra.*

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, based upon the foregoing, Kane County respectfully requests that relief be afforded ACD as requested in their *Respondent/Permittee's Response to Request for Hearing,* that the Petitioners' Request be dismissed and ACD allowed to proceed under permit with the operation of the Coal Hollow Mine as authorized under the Decision Document in this matter.

Respectfully submitted this 23 day of December, 2009.

William L. Bernard
Attorney for Kane County

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Intervenor's Response to Petitioners' Request for Agency Action and Request for a Hearing* was sent via U.S. Mail, postage prepaid, this 23 day of December, 2009, to the following:

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